CHIOW THIAM GUAN & ORS.

v.

SUPERINTENDENT OF PUDU PRISON & ANOR.

FEDERAL COURT, IPOH
WAN SULEIMAN FJ
SALLEH ABAS FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NOS. 204-208 OF 1982]
30 APRIL 1983

CONSTITUTIONAL LAW: *Internal Security Act - Mandatory death sentence under Internal Security Act 1960 (Revised 1972) - Application for an order of stay of execution - Pending hearing and finalisation of proceedings lodged in Court on the ground that the death sentence is unconstitutional - Injunction to restrain the Superintendent of Pudu Prison from carrying out the execution to which a warrant has been directed to him - Whether Federal Court has jurisdiction to hear the application and grant injunction.*

The appellant who was sentenced to death on 21 January 1981, under s. 57(1) of the Internal Security Act 1960 (Revised 1972), applied by way of notice of motion filed on 13 August 1982 for an order of stay execution pending the hearing and finalisation of the appeal he had lodged in the Federal Court on the sole ground that the death sentence was unconstitutional. The appellant had on 26 July 1982 filed a statement of claim in which he sought, *inter alia* for

(i) a declaration that the mandatory death sentence passed on him was unconstitutional and

(ii) stay of execution pending finalisation of the proceedings.

However, Hashim Yeop A. Sani J (as he then was) granted an application filed by the Attorney-General to strike out the claim on the ground that it disclosed no cause of action and the Judge also set aside the order of stay he had himself granted on 27 July 1982.

The learned Attorney-General submitted that the application for stay should be made to the Pardons Board which alone is empowered to order a respite of the execution of the warrant of execution.

Held:

[1] The Federal Court was in agreement that it cannot in any case grant an injunction to restrain the 1st respondent from carrying into effect a sentence in regard to which a warrant had been directed to him under s. 281(d)(iii) of the Criminal Procedure Code.

[2] Courts are indeed without jurisdiction to deal with this sort of application for the reason so neatly set out in the case of *de Freitas v. Benny* - "Mercy is not the subject of legal rights. It begins where legal rights end."

[3] In this country the prerogative of mercy is vested in His Majesty the Yang di Pertuan Agong. Any stay of execution would only be an extension of the prerogative of mercy, exercisable only by His Majesty the Yang di Pertuan Agong in accordance with Article 42 of the Constitution.

[Application dismissed.]

Cases referred to:
Tait v. The Queen [1962] 108 CLR 620
Gouriet v. U.P.W. (H.L. (E)) [1978] AC 435
Jairam Das v. Emperor [1945] AIR 94 PC
Sarat Chandra v. Khagendranath [1961] AIR SC 334
De Freitas v. Benny [1976] AC 239
Keat Long & Ors. v. Pardons Board Johore [1968] 2 MLJ 249

Legislation referred to:
Courts of Judicature Act 1964, s. 57(3)
Criminal Procedure Code, ss. 281(d)(i), (ii), (iii), 300
Federal Constitution, art. 42
Internal Security Act 1960 (Revised 1972), s. 57(1)
Mental Hygiene Act 1958 [Aust], s. 111
Rules of the High Court 1980, O. 18 r. 19

Other sources referred to:
Constitutional Law, Weater

For the applicants - Karpal Singh (Ngeow & Lee with him); M/s. Karpal Singh & Co. & M/s. Ngeow & Co.
For the respondents - Abu Talib bin Othman, A.G. (Lim Beng Choon with him)

JUDGMENT

The appellants who was under sentence of death applied by way of notice of motion for an order of stay of execution pending the hearing and finalisation of the appeal he had lodged in this Court on the sole ground that the death sentence is unconstitutional.

The notice of motion was filed on 13 August 1982, for hearing on 18 August, in contravention of r. 70(3) of the Rules of this Court which requires that the notice be served not less than 7 days before return date, but on Encik Karpal Singh applying for leave to give shorter notice and on the learned Attorney withdrawing his preliminary objection, we allowed the hearing to proceed on the application proper.

The appellant had on 26 July 1982 filed a statement of claim in which he sought, *inter alia* for (i) a declaration that the mandatory sentence of death passed on him on 21 January 1981 under the provisions of s. 57(1) of the Internal Security Act 1960 (Revised 1972), is unconstitutional and (ii) stay of execution pending finalisation of the proceedings.

Hashim Yeop A. Sani J (as he then was) granted an application filed by the Attorney General under O. 18 r. 19 of the Rules of the High Court 1980 to strike out the claim on the ground that it disclosed no cause of action. The same Judge also set aside the order to stay he had himself granted on 27 July 1982.

As to what happened thereafter, we were referred to the affidavit of Encik Ngeow Yin Ngee, one of the solicitors representing the appellants. It would appear that at the conclusion of proceedings on 12 August 1982, Encik Karpal Singh applied for stay of execution pending appeal to this Court, but the learned Judge indicated that such application should be made to the Federal Court, hence the present application.

In support of his application Encik Karpal Singh cited a High Court of Australia decision *Tait v. The Queen* [1962] 108 CLR 620. There, a petition was presented to the Supreme Court of Victoria seeking an inquiry under s. 111 of the Mental Hygiene Act 1958 into the sanity of a prisoner under sentence of death for murder. The petition was dismissed.

Independently of these proceedings an application was made on behalf of the prisoner to the Judge who had presided at the trial for an order that the execution of the sentence be respited. The Judge held that he had no power to make the order sought. On the dismissal of the petition, the petitioner appealed to the Full Court of the Supreme Court which dismissed the appeal. The petitioner applied for special leave to appeal to the High Court from the judgment of the Full Court and the prisoner applied for special leave to appeal from the order of the trial Judge.

When the motions came on for hearing the Court ordered that they be adjourned and made a further order in the following terms:

> That the execution of the prisoner fixed for tomorrow morning be not carried out but be stayed pending the disposal of the applications to this Court for special leave and of any appeal to this Court in consequence of such applications and that the Chief Secretary and the Sheriff and his deputy or deputies be restrained accordingly.

The learned Attorney however contends that this Court has no jurisdiction whatsoever to hear an application such as the present one. Jurisdiction, he adds can only be conferred by law. Each of the appellants had been tried in a High Court, and their appeals had been dismissed by this Court. The Pardons Board had duly considered the sentences imposed, and had not seen fit to interfere with these.

We were then invited to consider the provisions of s. 281(d)(i), (ii) and (iii) and s. 300 of the Criminal Procedure Code, which are as follows:

Section 281(d)(i) - on receiving the copy of the said order the Court shall cause the effect of the same to be entered in records of the Court, and when the said order directs the sentence to be carried out shall appoint the time when it is to be carried out and shall endorse the time so appointed upon the said order, and shall in all cases cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary;

(ii) - the Ruler of the State acting in accordance with the provisions of Article 42 of the Constitution may order a respite of the execution of the warrant and afterwards appoint some other time or other place for its execution;

(iii) - the warrant shall be directed to the officer in charge of the prison for the district where the sentence is to be carried into effect, who shall carry the sentence into effect, in accordance with law;

Section 300 (i) When any person has been sentenced to punishment for an offence the Ruler of the State (acting in accordance with the provisions of Article 42 of the Constitution) in which the offence was committed or in which the conviction was had may at any time, without conditions, or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(ii) Whenever an application is made to a Ruler for the suspension or remission of a sentence the Ruler may require the convicting Judge or Magistrate to state his opinion as to whether the application should be granted or refused and such Judge or Magistrate shall state his opinion accordingly.

(iii) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Ruler by whom it was granted, not fulfilled, the Ruler may cancel such suspension or remission; whereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer without warrant and remanded by a Magistrate to undergo the unexpired portion of the sentence.

(iv) Nothing herein contained shall be deemed to interfere the right of the Ruler of any State to grant pardons, reprieves, respite or remissions of punishment.

The application for stay, submits the learned Attorney, should be made to the Pardons Board which alone is empowered to order a respite of the execution of the warrant of execution at this stage.

This recourse to the civil jurisdiction of this Court as regard to sentences imposed at criminal trials had, he submits a parallel in the well known recent case of *Gouriet v. U.P.W. (H.L. (E))* [1978] AC 435 at 490 where Viscount Dilhorne said (at p. 490) -

> The criminal law is enforced in the criminal Courts by the conviction and punishment of offenders, not in the civil Courts. The jurisdiction of the civil Courts is mainly as to the determination of disputes and claims. They are not charged with responsibility for the administration of the criminal Courts.

He went on to say that under s. 57(3) of the Courts of Judicature Act, 1964 in the case of a conviction involving sentence of death, a notice of appeal results in a stay of execution, but the appeal against conviction and sentence in each of the cases which form the subject matter of these applications has been dismissed the conviction and sentence having in each instance been affirmed so that the subsection no longer applies.

Referring to passages in *Jairam Das v. Emperor* 1945] AIR PC 94 at pp. 95, 96 wherein it was held that where on an appeal from acquittal, a person was convicted, the High Court, after signing the judgment convicting the accused was *functus officio*, and thereafter had no power to release him on bail unless special leave to appeal was granted, the learned Attorney contends that similarly here only the Pardons Board is competent to allow stay of execution, this Court being *functus officio*.

By way of analogy he cited the Indian Supreme Court decision in *Sarat Chandra v. Khagendranath* AIR 1961 SC 334 at 336 wherein a passage from Weater's "*Constitutional Law*" is cited with approval and which reads thus:

> A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial power over sentences. "The judicial power and the executive power over sentences are readily distinguishable, observed Justice Sutherland. To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it *qua* judgment.

We are of the view that a passage from the Privy Council decision in a Trinidad and Tobago case, *De Freitas v. Benny* [1976] AC 239 at 247 cited to us is particularly apt. It reads:

> Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law. At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of

England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the example of a purely discretionary act as contrasted with the exercise of a quasi-judicial function.

In this country the prerogative of mercy is vested in His Majesty the Yang di-Pertuan Agong.

We also agree with the learned Attorney that we cannot, in any case grant an injunction to restrain the 1st respondent from carrying into effect a sentence in regard to which a warrant has been directed to him under s. 281(d)(iii). See *Keat Long & Ors. v. Pardons Board Johore* [1968] 2 MLJ 249.

Courts are indeed without jurisdiction to deal with this sort of application for the reason so neatly set out in the *de Freitas* case - "Mercy is not the subject of legal rights. It begins where legal rights end." Any stay of execution would be only an extension of the prerogative of mercy, exercisable only by His Majesty the Yang di-Pertuan Agong in accordance with Article 42 of the Constitution.

This application was accordingly dismissed.

Also found at [1983] 1 CLJ 278